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Supreme Court, U.S.
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No. 96-109

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

DOUGLAS RAY HICKMAN, *in propria persona*
Petitioner

v.

COUNTY OF LOS ANGELES, SHERMAN BLOCK, PATRICK G. LEONARD, CLAUDE FARRIS, ED BARSTON, THE CITY OF LOS ANGELES, ROBERT M. TALCOTT, HERBERT F. BOEKMANN, REV. A. B. TOOLEY, SAMUEL L. WILLIAMS, STEPHEN D. YSLAS, FRANK E. PEIRSOL, THE CITY OF SAN FERNANDO, AND DOMINICK J. RIVETTI,
Respondents

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

PETITIONER DOUGLAS RAY HICKMAN'S BRIEF IN REPLY TO OPPOSITION OF RESPONDENTS COUNTY OF LOS ANGELES AND SHERMAN BLOCK TO PETITION FOR WRIT OF CERTIORARI

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8 pp

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ARGUMENT IN REPLY

ARGUMENT

I.

INTRODUCTION

It is most curious that Respondents County of Los Angeles and Sherman Block chose not to address the merits of Petitioner's Petition for Writ of Certiorari. Rather, they briefly raised two technical challenges to the propriety of the Petition. The only reasonable inference from this is that, but

for the technical objections, Respondents would agree this Court should issue its Writ of Certiorari.[1]

Of course, it is entirely possible Respondents' opposition consisted of a scant two and one-half pages in an attempt to create the *impression* this Petition is of little import. However, in so doing, Respondents actually demonstrated additional compelling reasons for this Court to grant certiorari.

Specifically, Respondents showed the Ninth Circuit departed so far from the accepted and usual course of judicial proceedings as to call upon this Court to exercise its supervisory power, and further, that the Ninth Circuit decided an important question of federal law that has not been, but should be, settled by this Court. Pursuant to Supreme Court Rule 10(a) and 10(c), these are both important reasons for this Court to issue its Writ.

Since, as shown below, both of Respondent's arguments can be disposed of in short order, and since Respondents did not challenge the merits of this Petition, this Court is respectfully requested to grant certiorari in this matter.

II.

REGARDLESS OF WHAT THE PARTIES CONTENDED IN THEIR APPELLATE BRIEFS, PURSUANT TO SUPREME COURT RULE 10(a), THE "INDIVIDUAL RIGHT" ISSUE IS PROPERLY AND SQUARELY BEFORE THIS COURT

Rule 10(a) of the Supreme Court Rules states, in part, an important reason for this Court to grant certiorari is where a court of appeals "has so far departed from the accepted and

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[1]The Petition for Certiorari is cited as "Pet. _____" The Appendices to the Petition are cited as "Pet. App. _____" The Respondents' Brief in Opposition is cited as "Resp. Opp. _____."

usual course of judicial proceedings, . . . as to call for an exercise of the Court's supervisory power[.]"

If, as Respondents suggest, the Ninth Circuit adjudicated an issue which was not before it,[2] then the Ninth Circuit clearly departed from the "accepted and usual course of judicial proceedings" and it is incumbent upon this Court to exercise its supervisory power.

Indeed, if the Ninth Circuit strayed so far from the issue before it that its ruling had nothing to do with the contentions in Petitioner's appellate papers, then the Ninth Circuit exceeded its powers under Article III to the United States Constitution, such that it's opinion should be set aside on that basis alone.

On the other hand, the Ninth Circuit believed the issue of whether an individual has standing under the Second Amendment was squarely before it, because that was the sole issue it addressed in its published opinion.[3]

Either way, this Court should issue its Writ and thereby review the Ninth Circuit's opinion.

Moreover, Respondents' suggestion that this Court should not issue its Writ because Petitioner allegedly did not raise the individual rights issue in the court below would lead to an outrageous, circuitous and anomalous result. Namely, using Respondents' logic, review would never be possible with respect to any court of appeals opinion in which an appellate court strayed from the issues before it. In each

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[2]Resp. Opp. at 4.

[3]In addition, since the Ninth Circuit's opinion dealt solely with the "individual right" issue, it is irrelevant even if Petitioner quoted an updated version of Penal Code Section 12050, as Respondents assert. (Resp. Opp. at 2). This is because the Ninth Circuit's published opinion dealt only with the "individual right" issue, and Section 12050 had no bearing on the Ninth Circuit's holding.

such instance, the respondent would argue the petitioner had not raised the issue upon which the opinion was based, all the while, the petitioner could not have raised that issue because he or she could not have predicted the court of appeals would base its opinion on an issue which was not before it.

In short, Respondents' assertion that this Court should not grant certiorari because Petitioner allegedly did not litigate the "individual right" issue below, is wrong. The "individual right" issue is properly and squarely before this Court.

III.

PETITIONER DOES NOT SEEK AN "ADVISORY OPINION;" RATHER, PETITIONER ASKS THIS COURT OF LAST RESORT TO RECOGNIZE AND PROTECT AN IMPORTANT CONSTITUTIONAL RIGHT

At first blush, Respondents' assertion that Petitioner seeks nothing more than "an advisory opinion" appears valid. However, upon closer scrutiny, it quickly becomes clear this assertion is meritless.

Respondents assert Petitioner seeks an advisory opinion because, they contend, the outcome of the case below will not be altered even if Petitioner prevails.[4] This is plainly incorrect. Petitioner's initial complaint contained a cause of action for violation of the Second Amendment to the United States Constitution. This cause of action was dismissed by the trial court on March 31, 1992.[5]

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[4]Resp. Opp. at 5.

[5]Order.

Therefore, if this Court grants certiorari, and Petitioner ultimately prevails on the individual right issue, Petitioner will then have the right to proceed in the district court on his cause of action for violation of the Second Amendment. As such, Petitioner does not seek an advisory opinion; rather, he seeks an opinion which will have a very real and definite effect on the outcome this case.

If Petitioner is permitted by this Court to proceed on his Second Amendment cause of action, Respondents will, no doubt, argue in the district court the claim should be dismissed on incorporation grounds. However, only then will incorporation be an issue in this litigation. At the present time, and based on the record before this Court, the incorporation issue raised by Respondents is not yet "ripe."

This points out yet another anomaly created by the Ninth Circuit's opinion: the Ninth Circuit held the Second Amendment guarantees only a state's "right" to maintain a militia, yet it failed to explain how a state can even have a "right," as opposed to a "power."

The incorporation issue is clearly beyond the scope of this Petition. Nonetheless, it is worthwhile to note that while the Second Amendment has never been expressly incorporated against the states, since the advent of the Doctrine of Selective Incorporation around the turn of the century,[6] this Court has never held it is *not* incorporated against the states, either.

Moreover, it necessarily follows that before this Court can incorporate the Second Amendment against the states, this Court must first determine exactly what right is encompassed within that Amendment. Since this Court has never addressed the issue now presented; namely, whether the

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[6] *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226, 17 S.Ct. 581 (1897).

Amendment confers upon individual citizens standing to enforce a personal right to keep and bear arms, it is no surprise that this Court also has never addressed whether that right is incorporated against the states.

As stated above, the incorporation issue is beyond the scope of this Petition. Here, Petitioner simply asks this Court to resolve the much disputed[7] question as to whether the Second Amendment, included within the Bill of Rights, guarantees an individual right, or a "state's right."

Rule 10(c) of the Supreme Court Rules states an important reason for this Court to grant certiorari is where a court of appeals has "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Clearly, this is the situation in the present matter. This Court is respectfully requested to grant certiorari and resolve the very important, yet divisive, issue as to whether the Second Amendment guarantees an individual right.

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[7]See the *amicus* brief submitted in support of Petitioner by The Lawyer's Second Amendment Society, the Law Enforcement Alliance of America, and Doctors for Integrity in Policy Research, wherein their review of all the cases from the courts of appeals reveals there are conflicting rulings between, and within, the courts of appeals on the issue of whether the Second Amendment guarantees an individual right.